IN THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

STATE OF MISSOURI, *ex rel.* RYAN FERGUSON,	)	
Petitioner,	)	**Case No. WD 76058**
v.	)	
DAVE DORMIRE, Superintendent, Jefferson City Correctional Center,	)	
Respondent.	)	

PETITIONER'S REPLY TO ATTORNEY GENERAL'S SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

On February 11, 2013, this Court issued an order permitting the Attorney General ("Respondent") to file Suggestions in Opposition to the granting of the relief sought by Ryan Ferguson ("Petitioner") in his Petition for Writ of Habeas Corpus. This Court specifically asked Respondent to address: (1) how the Court is to review the Hon. Daniel R. Green's prior ruling, (2) how the Court should treat evidence regarding Mr. Boyd, and (3) (a) how the allegations of perjury at the trial *in general* and (b) how Judge Green's finding *in particular* that Mr. Trump lied during Petitioner's trial impact Petitioner's claim to a gateway of innocence.

Respondent has interpreted this Court's order as an invitation to advocate for a complete overhaul of Missouri habeas corpus jurisprudence. Rather than being concerned about a conviction that is based solely on perjured testimony, Respondent characterizes Petitioner's efforts to prove his innocence and the unfairness of his trial as

"a waste of judicial resources." (Sug. Op., p.3). What possible expenditure of judicial resources could be more justifiable than rectifying a wrongful conviction? The goal of the judicial system is not to conserve resources but to ensure that innocent people are not incarcerated, no matter what the cost. Besides, the cost of incarcerating an innocent man is incalculable in terms of human suffering and damage to the judicial system.[1]

Respondent chooses to "slay the messenger" by blaming Petitioner's attorneys for the recantations. Respondent claims that "Mr. Erickson had absolutely no fear of perjury charges" because prior to the appellate oral argument in August of 2010, Charles Erickson ("Erickson") was represented by Petitioner's counsel who promised Erickson she would obtain his freedom in exchange for his recantation. (Sug. Op., pp. 2-3). To support this false contention, Respondent has misconstrued the timeline of Petitioner's counsel's representation of Erickson. Petitioner's counsel began representing Erickson in March 2010 *after* Erickson gave his videotaped recantation on November 22, 2009 and *after* Petitioner had filed his Motion to Remand with this Court on February 5, 2010 with the November 22, 2009 videotape attached. (Pet. Exh. 34j2).

As this Court is well-aware, Petitioner's counsel had absolutely no contact with

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[1] "When guilty men escape, the law has merely failed. When an innocent man is condemned, it creates the very evil it was to cure, and destroys the security it was made to preserve." Sir Samuel Romilly, *Observations on the Criminal Law as It Relates to Capital Punishments, and on the Mode in Which It Is Administered,* in THE SPEECHES OF SIR SAMUEL ROMILLY IN THE HOUSE OF COMMONS 166 (1820)).

Erickson prior to his November 22, 2009 videotaped recantation. When Erickson gave his videotaped statement he read his own handwritten statement prepared on November 20, 2009 in his prison cell. (Pet. Exh. 34j2, p. 6). It would have been impossible for Petitioner's counsel to have warned Erickson "of the risk of perjury" (Sug. Op., p. 3) when she had never met him and had no idea he was preparing a written recantation of his trial testimony.

Respondent's disingenuous argument is completely refuted by Respondent's own interview of Erickson's mother, Marianne Erickson, on March 6, 2012:

> Q. Does he think this is going to help him out?
> A. No, he does not.
> Q. He's never told you that? That he thinks this is going to help him. If he helps Ryan, this will help him.
> A. No, I think, that he expects that if -- if Ryan is given a new trial that he'll be involved in that trial to give testimony and then he has many question marks about -- you know, what will happen in his own case and he has had no -- he has no idea how much longer he may spend in prison. What he told me that November was, **I'm prepared to spend the rest of my life in prison** because I -- I told a lie. A very bad lie and this man is in prison, you know, for 40 years because of what I said. And I'm a man -- I've become a man in prison and I -- I'm going to --
> Q. Well, since November of 2009 has he made any statements to you that he believes he will benefit from changing his story?
> A. No.
> Q. Has he been told, to your knowledge, by anyone that if he changes his story or based on this helping Ryan Ferguson out that he will benefit?
> A. No. (Pet. Exh. 140, pp. 61-62)[2]

In Respondent's interview, Marianne Erickson sheds more light on Erickson's recantation

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[2] Petitioner submits Respondent's transcribed interview of Marianne Erickson, dated March 6, 2012, as Petitioner's Exhibit 140, and files a copy of that exhibit along with this Reply.

and the reasons he pled guilty in 2004:

> Q. Did he tell you why he was doing it?
> A. Yes, he did.
> Q. What'd he tell you?
> A. Said he wanted to set the record straight. **That he was prepared to spend his life in prison.** That he -- he just made some assumptions from the evidence that he had at the time of his arrest. And, you know, had to claim -- he was -- he was afraid because at the time in 2005 -- 2004 the death penalty still existed for 17 year olds and he -- he lied he said because the prosecutors had told him that Ryan was going to turn state's evidence on him. And so he lied about what Ryan did because he thought he would save his own self from the death penalty by saying that Ryan had done everything. (Pet. Exh. 140, p. 53).[3]

Tellingly, Respondent did not move to admit this interview transcript into evidence. Respondent also misrepresents that Petitioner's counsel, in a *48 Hours* broadcast, claimed she would obtain Erickson's release after Petitioner had been freed. (Sug. Op., p. 3). What Petitioner's counsel actually stated, when asked if she would fight for Erickson after she was finished fighting for Petitioner, was as follows: "I will, yeah. Because one case cannot survive without the other. And when one goes down, the other one's going to go down." Judge Crane agreed at the habeas hearing that Erickson and

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[3] Marianne Erickson also confirmed that there were "big problems" with Erickson's story at the time of his arrest. (Pet. Exh. 140, p. 49). She further confirmed that Erickson told her prior to 2009 that he had blacked out on the night of the murder. (Pet. Exh. 140, pp. 59-60). And she stated that testing in 2001 revealed that Erickson had memory deficiencies. (Pet. Exh., p. 19). Finally, Marianne Erickson stated that it is "certainly not" the case that any of Erickson's prison "altercations" were related to his guilty plea or testimony in this case. (Pet. Exh. 140, p. 64).

Petitioner were either both guilty or both innocent. (HH Crane 616-18). In the *48 Hours* interview Petitioner's counsel never once stated that she would obtain Erickson's release.

During Erickson's representation, Petitioner's counsel provided him with statements of Megan Arthur ("Arthur"), Kim Bennett ("Bennett"), Dallas Mallory ("Mallory"), Richard Walker ("Walker"), and Jerry Trump ("Trump"), which refuted the police reports given to Erickson prior to his plea in November, 2004. Erickson was unaware of the existence of these witness statements. After studying these witness statements Erickson concluded that his decision to enter a guilty plea was based upon false information. (Pet. Exh. 34a).[4]

Respondent ignores the fact that Petitioner's counsel ceased to represent Erickson in April of 2011, a full year before Erickson's testimony at the habeas hearing. Facts do not cease to exist simply because they are ignored. Attorney John O'Connor ("O'Connor") volunteered to represent Erickson pro bono, as had Petitioner's counsel. On August 29, 2011, O'Connor disclosed, to both sides, Erickson's most comprehensive affidavit detailing his false trial testimony. (Pet. Exh. 34a). O'Connor continued to

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[4] Petitioner's counsel obtained a written waiver from Erickson before assuming his representation. Counsel prepared three affidavits (dated October 21, 2010, November 23, 2010, and February 9, 2010) for Erickson pursuant to his directions. (Pet. Exh. 34b-d). Erickson modified his affidavits as he reviewed more documents. None of these affidavits were as explicit about his false trial testimony as his last affidavit prepared when he was represented by O'Connor.

represent Erickson at the habeas deposition and hearing where Erickson admitted perjury under oath and in open court. Erickson had the option of taking the Fifth Amendment to protect himself from perjury charges, but chose not to do so, presumably after consultation with O'Connor. Erickson testified that he knew his plea deal might be revoked because he had committed perjury at Petitioner's trial. (HH Erickson 335-36).

Erickson's habeas recantation details the same blank memory about the crime he described to the police upon his arrest on March 10, 2004. In a seemingly endless effort to frustrate justice, Respondent argues that it was only "much later" after Erickson's initial sworn admission of perjury on November 9, 2009, that he would "parrot" what Petitioner wanted him to say about his memory loss. (Sug. Op., p. 4). This representation to the Court is false. Erickson's descriptions of intoxication, drug use and a blank memory of the crime are preserved in his 2004 interrogation tapes and interviews. Detectives Short and Nichols provided him with all of the key details of the crime and he memorized the police reports for his testimony at Petitioner's trial. (*See* Petition, pp. 39-40, 45-46, and 49-51).

Respondent likewise never addresses the admissions from its own brief, filed on direct appeal, that Erickson may have had a blackout and simply could not remember the events of November 1, 2001. Respondent's brief stated, "Indeed, there was substantial evidence of Erickson's intoxication at the time of the murder, and the jury might have reasonably believed that Erickson had experienced what is commonly known as an alcohol-induced 'blackout,' and that Erickson simply does not recall his actions." (Pet. Exh. 120, p. 62). Respondent's claim that Petitioner's counsel suggested the "memory

stuff" to Erickson years later is flatly contradicted by his 2004 interviews with the police. Petitioner's counsel was hundreds of miles away during Erickson's interrogation and had no awareness of him, his memory problems, or the Heitholt murder.

The fact that Erickson's story evolved from having no memory of the critical details of the crime to providing all of those details at Petitioner's trial should have been a red flag that Erickson's trial testimony was a complete fabrication, just as he confirmed in the 2012 habeas hearing. From his arrest in 2004 Erickson's story evolved from knowing nothing about the murder, except what he read in newspaper stories, to recovering memories which exactly mirrored the police reports he was provided. Erickson was able to parrot those details in his 2005 testimony. Nonetheless, Erickson's trial testimony was filled with errors and inconsistencies. Respondent conceded, in its appellate brief on the direct appeal, that Erickson was repeatedly impeached at trial, citing seventeen examples. (Pet. Exh. 119, pp. 53-55).

Respondent argues that this Court has already ruled on Petitioner's claim that the prosecutor knew or should have known that he used perjured testimony at trial in Petitioner's Rule 29.15 appeal. (Sug. Op., pp. 4-5). This Court found that Petitioner alleged in "conclusory fashion" that the State used Erickson's testimony knowing it was perjured and upon that basis denied relief. *State v. Ferguson*, 325 S.W.3d 400, 407 (Mo. App. W.D. 2010). Of course, that ruling was handed down before Trump testified at the habeas hearing that he lied when he identified Petitioner at trial, and that the newspaper story was a fabrication engineered by the prosecuting attorney. It would have been impossible to raise the Trump recantation before it had occurred.

I. HOW THIS COURT IS TO REVIEW JUDGE GREEN'S RULING

Rather than address the specific question posed by this Court, Respondent asks this Court to adopt and follow the federal rules governing habeas petitions to impose an additional burden on Petitioner to show "cause" for further review, and claims Petitioner should have filed an application for writ of certiorari with this Court (albeit without any citation to supporting controlling authority).[5] (Sug. Op., p. 11).

Respondent contends that this Court "should not accept this petition because there are no new claims." (Sug. Op., pp. 5-7). Respondent further argues that this Court's review is limited to determining whether the habeas court exceeded the bounds of its jurisdiction by way of a petition for writ of certiorari. (Sug. Op., p. 8). Respondent seems unaware of current Missouri law regarding the standard of review on writ of certiorari, which requires the higher court "to review whether the habeas court exceeded its authority or abused its discretion, and *not* whether it exceeded its 'jurisdiction.'" *State ex rel. Koster v. Green*, 388 S.W.3d 603, 606 n.6 (Mo. App. W.D. 2012) (emphasis added).

The standard of review on writ of certiorari is irrelevant, however, because Respondent's argument incorrectly applies Missouri law. "The proper procedure following the denial of a petition for a writ of habeas corpus is to file a new petition in the appellate court." *Weir v. State*, 301 S.W.3d 136, 139 (Mo.App.W.D. 2010), citing

[5] Respondent's efforts in its Suggestions in Opposition to promote a complete overhaul of Missouri's habeas law can more properly be classified as a "waste of judicial resources."

Blackmon v. Mo. Bd. of Prob. & Parole, 97 S.W.3d 458 (Mo. banc 2003); *see also Bromwell v. Nixon*, 361 S.W.3d 393, 396 (Mo. banc. 2012) ("The dismissal of a petition for a writ of habeas corpus can only be pursued by petitioning a superior court for such a writ, not by appeal." (emphasis added)).

Respondent's claim that a petitioner must present an appellate court with "new claims" or "at least new reliable evidence to support a claim that has already been addressed" before a higher court may accept a habeas petition also directly conflicts with Missouri Supreme Court Rules. (Sug. Op., p. 10). Rule 91.02 states that "the petition in the first instance shall be to a circuit or associate circuit judge for the county in which the person is held in custody if at the time of the petition such judge is in the county, unless good cause is shown for filing the petition in a higher court." By rule, any "new claims" have to be filed in a petition with the circuit court, unless there was good cause to file such a petition with a higher court.

Respondent relies on inapplicable federal habeas law in an effort to prevent this Court's review of Petitioner's petition. Respondent notes that federal statutes and rules proscribe successive petitions if the successive petition does not allege new or different grounds for relief. (Sug. Op., pp. 11-12). Respondent's argument fails because Missouri habeas jurisprudence differs significantly from federal law.[6] In Missouri there is no

[6] Respondent concedes that "federal procedural rules and statutes are not binding on how Missouri processes successive habeas petitions" yet seeks to have this Court follow federal law where it conflicts with Missouri habeas jurisprudence. (Sug. Op., pp. 11-12).

procedural bar to successive habeas corpus petitions. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. banc 2001). Moreover, while the federal scheme allows for appeal from the denial of a habeas petition (28 U.S.C. §2253(a)), in Missouri a petitioner must file an original application for habeas relief with a higher court once the lower court has denied his petition. *Weir*, 301 S.W.3d at 139.

That Respondent's position is completely contrary to Missouri law is clearly illustrated by other cases where habeas relief was granted by a higher court despite the circuit court rejecting the claim *after* an evidentiary hearing. *For e.g., State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. banc 2010); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73 (Mo. banc 2011). Under Respondent's proposal that relief would have been denied, because the petitioners would not have been able to file an original application for habeas relief with the higher court. This clearly is not the law.

In regard to the circuit court's findings, Respondent wrongly asserts that Petitioner has conceded that those findings and conclusions are to be given the weight and deference that would be given to a court-tried case by a reviewing court. (Sug. Op., p. 14). To the contrary, Petitioner has stated in his Petition that this is an original action, and only to the extent that this Court believes it is constrained by Judge Green's findings and conclusions are they likely afforded the weight and deference which would be given to a court-tried case by a reviewing court. (Petition, p. 103). However, because this is an original action, this Court is in no way limited by the lower court's ruling.

State ex rel. Amrine v. Roper is directly on point. In *Amrine* two of the witnesses who testified against the defendant at trial recanted their trial testimony at a Rule 29.15

hearing. 102 S.W.3d 541, 544 (Mo. banc 2003). The motion court denied relief and the Missouri Supreme Court affirmed. *Id.* After the third witness against the defendant recanted in an affidavit, a hearing was held in federal district court on the defendant's habeas petition claiming actual innocence. *Id.* at 545. The district court denied relief on the basis that the third recantation was unreliable and because the other recantations were not "new evidence." *Id.* The petitioner subsequently filed an original petition for writ of habeas corpus with the Missouri Supreme Court. The Supreme Court granted relief despite previous court findings that the recantations were not credible, holding that confidence in the conviction and sentence was seriously undermined. The Supreme Court did not require another evidentiary hearing on the credibility of the three recanting witnesses despite the findings and denial of relief by another court.

As in *Amrine*, this Court is not bound by Judge Green's findings in this original action. It would be difficult for this Court to give deference to most of those findings, because they are largely unsupported by the evidence and erroneously declare and apply Missouri law. (*See* Petition, 102-52).

II. THE RECANTATIONS OF TRUMP AND ERICKSON, SEPARATELY OR TOGETHER, CONSTITUTE "NEW RELIABLE EVIDENCE" AND ESTABLISH THE REQUISITE "PROBABLE INNOCENCE" FOR A GATEWAY OF INNOCENCE CLAIM

In regard to this Court's request for briefing on the effect the allegations of perjury have on Petitioner's gateway of innocence claim, Petitioner states as follows:

A. Jerry Trump

Jerry Trump's recantation of his in-trial identification of Petitioner is credible and

supported by the evidence. (Petition. pp. 21-29, 137-43, 145-47). A few points of clarification are necessary due to Respondent's perplexing arguments regarding Trump.

i. Trump's recantation is new evidence

Trump's recantation is "newly discovered" under any standard. The fact that Petitioner has always known that Trump lied at his trial (because Petitioner was not at the scene) does not alter the fact that Trump did not admit at trial that his testimony identifying Petitioner was false. Respondent's position, which would bar a petitioner from presenting any subsequently discovered evidence tending to prove a fact he attempted to prove at trial (Sug. Op., pp. 15, 23), would demolish Missouri habeas law. Indeed, one's innocence is always litigated at trial. Similarly, Respondent's assertion that Trump's recantation is not new because Judge Green determined it was credible due to, in part, his assessment of Trump's trial testimony (Sug. Op., p. 15), does not alter the fact that Trump's recantation did not exist until years after the trial.[7]

ii. Trump's recantation is reliable

Respondent does not dispute that Judge Green found Trump's habeas hearing recantation of his in-court identification of Petitioner to be credible. And Respondent

[7] Judge Green determined, in fact, that Trump's recantation was new, unlike Erickson's recantation. (Pet. Exh. 116, p. 31). Judge Green determined that Petitioner's claim failed because Trump's recantation did not sufficiently undermine his confidence in the verdict, rather than because it was not new. At no point in his entire 40-page Findings does Judge Green find that Trump's recantation was not new.

does not dispute the most salient indicator that Trump's recantation is reliable: he has subjected himself to incarceration for perjury by his habeas testimony. (Petition, p. 26) (HH Trump 234).

Instead, Respondent makes the wholly unsubstantiated claim that Petitioner's investigator somehow coerced Trump's recantation. (Sug. Op., pp. 24-27, 38-40) (*See* Petition 145-47). The fact that Trump's strongest admission of perjury occurred during the habeas hearing in response to questions posed by Judge Green, not in an affidavit allegedly coerced by Petitioner's agents, eviscerates Respondent's argument. (Petition, pp. 20-29, 137-143).

iii. Trump's trial testimony was material to Petitioner's conviction

Respondent states that "Mr. Trump did not testify at the circuit court hearing that he had eliminated Mr. Erickson or Petitioner as the two young while [sic] males he saw near the victim's car." (Sug. Op., p. 27 n. 12). This is untrue. At the circuit court hearing, Trump clearly stated under oath that he lied when he testified at trial that he saw Petitioner by Heitholt's car. (HH Trump 233, 262-63).

Respondent notes the binding effect of prior admissions but does not acknowledge its own. (Sug. Op., pp. 17-18 n.9). Respondent has made a number of admissions in prior pleadings about Erickson's testimony that he had a blank memory of the early hours of November 1, 2001, and that a reasonable jury could believe he suffered an alcohol-induced blackout. (Petition, pp. 32-33, 49-50). These admissions establish the substantial materiality of Trump's testimony: he offered eyewitness identification that was unimpeached and stood in sharp contrast to the severely impeached testimony of

Erickson.[8] (*Contra* Sug. Op., p. 21 (stating that Trump's testimony was immaterial because Erickson's trial testimony was credible)). The materiality of Trump's trial testimony was made completely clear to the jury by Prosecutor Crane who stated at the end of his closing argument, "Jerry Trump, in front of you all, in court, said, 'I saw those photos, and they were the ones.' And in court, he pointed them out." Prosecutor Crane never told the jury that Trump corroborated Erickson's testimony, rather he presented Trump as an unbiased, independent witness who placed Erickson and Ferguson at the crime scene. Certainly a conviction could have been obtained on Trump's testimony alone. (TT 2122). "[T]he eye-witness testimony of a single witness, if believed by the jury beyond a reasonable doubt, is sufficient to support a conviction, since the credibility and weight to be given the testimony are matters for the jury." *State v. Robertson,* 667 S.W.2d 18, 20 (Mo. App. E.D. 1984).

Respondent, in an effort to bolster Erickson's trial testimony, makes the profoundly uninformed assertion that "the compelling fact remains that individuals do not

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[8] Respondent ignores the State's admissions and instead focuses on a comment made by Petitioner's counsel at oral argument in 2010. Respondent concludes that Petitioner's counsel believes that Trump's trial testimony "was not material and merely cumulative." (Sug. Op., pp. 16-18). Petitioner' counsel was merely responding to a court question. The court asked '"Well there was an eyewitness wasn't there?" And counsel responded "Actually there was not." (Resp. Exh. 1, p. 5). Petitioner's counsel wanted the Court to know that Trump had not witnessed the crime occurring.

plead guilty and accept a 25-year sentence for a crime they do not commit." (Sug. Op., p. 20). This claim is clearly refuted by case statistics across the country where individuals have falsely confessed, and pled guilty, to crimes they did not commit. *See generally* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2010) (providing compelling statistics on false confessions and false guilty pleas).[9] The Missouri Supreme Court has acknowledged that:

> It has been reported that there are at least 125 cases of proven false confessions, in which a person has confessed to a crime, only to have another proved guilty. According to this study, at least fourteen persons within this group not only confessed, but pleaded guilty to crimes they were later shown not to have committed.

Weeks v. State, 140 S.W.3d 39, 46 n.6 (Mo. banc 2004) (citations omitted).[10] Respondent's assertion reveals that the Attorney General of Missouri, the chief law

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[9] *See also* University of Virginia School of Law, *False Confessions,* www.law.virginia.edu/html/librarysite/garrett_falseconfess.htm; Death Penalty Information Center, *Five Innocent People Exonerated in Nebraska*, http://www.deathpenaltyinfo.org/five-innocent-people-exonerated-nebraska-defendants-were-threatened-death-penalty (all five alleged co-conspirators in *State v. White*, 274 Neb. 419, 421 (2007), including the four that pled guilty and testified, exonerated and "100 percent innocent").

[10] Additionally, Respondent cites Buckley's statement that "[g]uilty people always try to minimize their culpability," (Sug. Op., p. 20), but conveniently leaves out Buckley's more pertinent testimony, such as "[police should] be very wary of the voluntary confession. . . . It's not typically what guilty people do." (Petition, pp. 42-45; HH 82).

enforcement officer in the state, is unaware that persons have falsely confessed and pled guilty to crimes they did not commit. This is a truly disturbing revelation in the year 2013.

Respondent cannot refute the evidence establishing the significance of Trump's testimony, the recantation of which instantly undermines any confidence one could have in Petitioner's conviction. Namely, (1) Trump's testimony accounted for 50% of the evidence in this case which convicted Petitioner, (2) the physical evidence excluded Petitioner and Erickson as the perpetrators, and (3) the only testimony other than Trump's linking Petitioner to the crime was Erickson's severely impeached and now recanted trial testimony. (Petition, p. 106).

Clearly Trump's identification of Petitioner was the glue that held Petitioner's conviction together through all the different appeals. When Judge Asel denied the Petitioner's 29.15 motion she specifically found credible Trump's trial testimony stating that "upon seeing their photographs he recognized Movant and Erickson as the persons in the parking lot that night." *Ferguson v. State*, 07BA-CV05888, p. 28 (June 12, 2009).[11] Judge Asel found that Trump's trial identification of Petitioner was unimpeached.

[11] For this Court's convenience, Petitioner submits the relevant portion of Judge Asel's order dated June 12, 2009, as Petitioner's Exhibit 141, and files a copy of that exhibit along with this Reply.

B. Charles Erickson

Erickson's recantation of his trial testimony is fully corroborated by all the available evidence. (Petition, pp. 9-17, 30-53, 121-137). Respondent makes the nonsensical argument that Erickson's trial testimony on cross-examination cannot establish habeas relief because it is not "new." (Sug. Op., p. 40). Obviously, Erickson's trial testimony is not new, but his recantation is.

Petitioner is unaware how the fact that Erickson "wanted to plead guilty" possibly "refutes" his recantation. (Sug. Op., pp. 29-30). It has never been disputed that Erickson wanted to plead guilty. He wanted to plead guilty for no fewer than six reasons, which are set out in the Petition. (Petition, pp. 46-48, 132; HH Erickson 381-82).

Respondent focuses solely on Erickson's fear of receiving the death penalty and ignores the rest.[12] Respondent's contention that Prosecutor Crane was not considering the death penalty is refuted by Prosecutor Crane's own statements to the media. Prior to the trial, Prosecutor Crane explained in a television statement and Columbia Tribune news article that he was considering the death penalty and would be discussing whether to seek it with the victim's family. The televised news report stated, "Crane said he had made no decision about seeking the death penalty." (Pet. Exh. 112). Erickson's fear of being charged with the death penalty was confirmed by his mother in her March 6, 2012

[12] Petitioner inadvertently stated that he was charged with felony murder in the second degree in his Petition. (Petition, p. 5). In actuality, Petitioner was charged with murder in the first degree, and was convicted of murder in the second degree.

interview with the Respondent. (Pet. Exh. 140, p. 53). The issue is not whether Erickson could have been charged with the death penalty, but whether Erickson thought the death penalty was being considered by the prosecutor because of the prosecutor's statements to the media, which cannot be disputed.

Respondent claims it is a "myth" that Erickson was fed information by the police (Sug. Op., p. 43) despite the fact that this Court can view the Erickson interrogation tapes and confirm this happened. (Pet. Exh. 21, 21 (a)) (Petition, pp. 72-76, 125-29). Respondent's citation to Erickson's trial testimony (over a year after he was fed information by the police) about what he told two friends who were never called at trial to corroborate these statements does not alter this conclusion. (Petition, pp. 73-75). Respondent's reliance on what Erickson allegedly told Hawes over a year after he was arrested does not address the issue of whether he was provided with the key details of the crime by the police upon his arrest. (Petition, pp. 73-74). Erickson's recantation is fully supported by all the evidence. (Petition, pp. 9-17, 30-53, 125-37).

Respondent does not dispute that the DVD (R58) reviewed by Judge Green in making a credibility assessment of Erickson did *not* contain the entire trial, was not an official court record, was not created for the purpose of judicial review, contained gaps in testimony, was missing portions of the trial, had poor audio quality, and had various technical issues.[13] (Petition, pp. 121-24). Instead, Respondent argues that Petitioner

[13] Respondent implies that Petitioner's only complaint about the video is the fact that it does not show bench conferences. (Sug. Op., p. 32 n.14). This is clearly untrue.

should have objected to the video being submitted into evidence. The flaw in Respondent's argument is that exhibit 58 was not admitted into evidence as the *entire* trial video; in fact, portions of Erickson's testimony were missing altogether. (Pet. Exh. 125 ¶ 8-10, 15-16). When Respondent moved Exhibit 58 into evidence at the habeas hearing no representation was made that it was the *entire* Ferguson trial video, rather Mr. Hawke stated "R58, R58 is the copy videotape -- well, not videotape, but this copy of the -- *of the CBS footage* of the Ryan Ferguson trial."[14] Nothing about this representation would have led Petitioner to anticipate that Judge Green would use this incomplete television footage as the exclusive basis for determining Erickson's credibility at trial. Certainly the case law would not have alerted Petitioner to Judge Green's intentions because there is no case in which a reviewing court has watched unofficial television footage of trial testimony to determine witness credibility. Certainly Petitioner's counsel would have objected if a representation had been made that Judge Green was going to rely upon these incomplete videos to assess Erickson's credibility.

C. Procedural Innocence Claims

Under Missouri law, innocence serves a procedural role in habeas corpus jurisprudence. Even if Petitioner's claims are procedurally barred this Court may decide if his new evidence shows "that it is more likely than not that no reasonable juror would have convicted him." *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000) (following the

[14] However, other videos presented in the hearing were used by Respondent merely as conduits for presenting Erickson's prior statements. (*E.g.*, HH Erickson 356, 379-8).

lead of *Schlup v. Delo,* 513 U.S. 298, 327 (1995)). Because "habeas corpus is, at its core, an equitable remedy," *id.* at 319 "the ultimate equity on the prisoner's side [is] a sufficient showing of actual innocence." *Withrow v. Williams,* 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part). Thus, if a prisoner proves he is probably innocent, "a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 316.

A predicate to the actual innocence gateway is the presentation of "new reliable evidence" of actual innocence. Once such evidence is established, "the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House v. Bell*, 547 U.S. 518, 537-38 (2006). The actual innocence determination is a "probabalistic" one "about what reasonable, properly instructed jurors would do." *House*, 547 U.S. at 538. Proper instruction, of course, includes the requirement that the defendant be guilty beyond a reasonable doubt. Thus, a petitioner must show "that more likely than not any reasonable juror would have reasonable doubt." *Id.* at 538. It is not necessary to determine with certainty that the petitioner is guilty or innocent. *Id.*

This Court has held, "The sole evidence tying Ferguson to the crime was the testimony of Erickson and the identification from Trump." *State v. Ferguson*, 325 S.W.3d 400, 419 (Mo.App.W.D. 2010). Judge Green has determined that Trump's recantation is credible and true as to his falsely identifying Petitioner at his trial. Because

the two recantations, either in isolation or combination, constitute new and reliable evidence of innocence, a review of ***all*** the evidence must be performed, a review never conducted by Judge Green.

It cannot be overstated : **the physical evidence excluded Petitioner and Erickson as the perpetrators, and Petitioner's conviction rests solely on two witnesses who have fully recanted their trial testimony in open court under the penalties of perjury.**[15] Petitioner has established a freestanding actual innocence claim as well as the actual innocence gateway. (Petition, pp. 62-64, 97-99).

D. The gateway of innocence allows this Court to consider Petitioner's jury selection claim

On March 29, 2011, this Court denied Petitioner relief on the jury issue, stating, "This denial is without prejudice to Ferguson reasserting this issue in this Court subsequent to the Circuit Court's disposition of the Petition pending there, or from seeking other appropriate relief." *State v. Ferguson*, WD 73705.[16] The only two published cases that address the precise jury issue raised by Petitioner have been granted relief. *State ex rel. Koster v. McCarver*, 376 S.W.3d 46 (Mo.App.E.D. 2012); *Preston v. State*, 325 S.W.3d 420 (Mo.App.E.D. 2010). (*See also* Petition, pp. 91-102). Unlike

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[15] The cases cited by Respondent (Sug. Op., p. 24), where the witnesses failed to testify in court and under oath as to their recantations, have no applicability here. (Petition, pp. 108-13)

[16] Petitioner submits this Court's order dated March 29, 2011, as Petitioner's Exhibit 142, and files a copy of that exhibit along with this Reply.

those two cases Petitioner has presented clear and convincing evidence of his actual innocence. Because Petitioner has established by a preponderance of the evidence that no reasonable jury would convict him in light of this new evidence, *supra*, Petitioner has established the "gateway" of innocence that entitles him to review of his otherwise arguably procedurally barred constitutional jury claim. *State ex rel. Woodworth v. Denney*, __ S.W.3d __, 2010 WL 3118435, *5 n.5 (Mo. banc Jan. 8, 2013).

Respondent argues that this claim has already been litigated and that Rule 91.22 prevents this Court from considering the issue. (Sup. Op., pp. 53-54).[17] Judge Callahan previously ruled that Petitioner had not at that time alleged any new evidence of actual innocence and denied relief. (Pet. Exh. 118, pp. 2-3). Now, Petitioner has established a gateway of actual innocence based on the recantations. This distinguishes Judge Callahan's ruling. The instant petition has not been filed with any higher court, so no higher court has considered the jury issue in light of Petitioner's actual innocence. As detailed, *supra*, Missouri has recognized that the "actual innocence gateway" allows

[17] Despite the clear holding of *State ex rel. Nixon v. Jaynes*, *supra*, Respondent contends by way of footnote that Rule 91.22 precludes this Court from granting relief on a "second habeas petition." Once again, Respondent fails to address the ample case law which holds there is no procedural bar to successive petitions in Missouri, and that Petitioner's sole vehicle for challenging the dismissal of a petition for writ of habeas corpus is to refile the petition with a higher court.

previously barred issues to be considered. *Clay*, 37 S.W.3d at 217, adopting *Schlup*, 513 U.S. at 327. The gateway permits this Court to review this claim.

This Court and the Supreme Court summarily dismissed the prior petition (which did not include the gateway innocence claim), without expressly adopting the reasoning set forth in Judge Callahan's ruling. And Judge Callahan's ruling directly conflicts with subsequent appellate court authority which holds that the Lincoln County jury selection was unconstitutional. The merits of Respondent's arguments have been rejected by *Preston* and *McCarver*.

Not only would the failure to grant the writ on the jury issue as to one who is actually innocent constitute a manifest injustice, but denial of relief would deny Petitioner due process and equal protection of the law. Had Petitioner raised the jury selection issue in the Eastern District, based on case precedent he would have been granted relief.

The *McCarver* court held that the defendant had established cause and prejudice to have the jury selection claim reviewed. 376 S.W.3d 46. The appellate court granted relief, holding that the jury selection procedure deprived the defendant of due process of law and a jury drawn from a fair cross-section of the population in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution. *Id.* at 49, 54.

Equal protection of the law should not be denied to Petitioner on the identical issue. The decision on this constitutional issue should not be determined by the location of Petitioner's prison. See *State ex rel. James v. Stamps*, 562 S.W.2d 354, 355 (Mo. banc

1978) (holding that equal protection mandates that felons confined in St. Louis medium security institution be afforded the same rights and benefits which accrue to a similarly situated defendant serving a sentence on the same charge in the Missouri Department of Corrections with respect to good conduct credit).

III. EVIDENCE REGARDING MICHAEL BOYD IS NOT BARRED

House v. Bell directs that this Court review the Boyd claim. 547 U.S. at 537-38, 552-53 (considering testimony that another person committed the crime); *Amrine*, 102 S.W.3d at 548 ("[T]he evidence supporting the conviction must be assessed in light of all of the evidence now available."). Petitioner has presented physical evidence, and other evidence, that directly connects Boyd to the crime. (Petition, pp. 54-62). This Court may consider the Boyd evidence "without regard to whether it would necessarily be admitted . . . at trial." *House*, 547 U.S. at 537-38. Finally, Boyd's claim has not been abandoned with this Court because this is an original petition.

IV. BRADY VIOLATIONS

Respondent asks this Court to review the *Brady* violations in isolation, attempting to justify the State's suppression of each item of critical evidence in a vacuum. Respondent makes the fallacious argument that all of the *Brady* violations had no evidentiary value. (Petition, pp. 86-90). To accept Respondent's argument, one must ignore the obvious value of evidence that would have: 1) established perjury by a key State witness (Petition, pp. 80-81), 2) permitted Petitioner to set forth a timeline destroying the State's theory of the case (Petition, pp. 81-85), and 3) provided an alibi for Petitioner (Petition, pp. 85-86). When reviewing a habeas petition premised on an

alleged *Brady* violation, the Court considers ***all available evidence*** uncovered following the trial. *Griffin,* 347 S.W.3d at 77.

Conclusion

WHEREFORE, Petitioner, Ryan Ferguson, requests that for all the foregoing reasons and the reasons advanced in his Petition, this Court issue a writ of habeas corpus discharging Petitioner from his unconstitutional convictions and sentences with prejudice, or grant any and all other relief deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent through the eFiling system, this 22nd day of March, 2013, to:

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